Petition

81-889

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Supreme Court of the United States

October Term — 1981

JIM T. HARRISON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (NOW THE ELEVENTH CIRCUIT)

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Questions Presented

1. Did the Trial Court err by failing to dismiss the indictment because it did not charge an offense within the terms of 21 U.S.C.A. Section 841(a)(1)?
2. Did the Trial Court erroneously take judicial notice of schedules of controlled substances without proof of those schedules at the date of the alleged offenses?

Parties to the Proceedings in the Court of Appeals

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JIM T. HARRISON, JR.,

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vs.

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

Opinions and Order Below

The order of the Fifth Circuit Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is printed as Appendix A.

The opinion of the Fifth Circuit Court of Appeals of October 24, 1980, is printed as Appendix B and is reported as *United States v. Harrison,* 628 F.2d 929.

The opinion of the Fifth Circuit Court of Appeals of July 20, 1981, is printed as Appendix C and is reported as *United States v. Harrison,* 651 F.2d 353.

Jurisdiction

The order of the Fifth Circuit Court of Appeals Unit B (now the Eleventh Circuit) in denying a petition for rehearing and petition for rehearing en banc was entered on September 11, 1981.

The opinion of the Fifth Circuit Court of Appeals, in reversing its previous ruling, was entered on July 20, 1981; the Fifth Circuit's previous opinion, in reversing the Trial Court, was entered on October 24, 1980.

Jurisdiction in this Court is invoked pursuant to Rule 17.1 of this Court.

Statutes Involved

1. 21 U.S.C.A. Sections 802(10) and 802(11), which provide:

> "(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject."

"(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. The term "distributor" means a person who so delivers a controlled substance."

2. 21 U.S.C.A. Section 841(a), which provides:

"(a) Except as authorized by this sub-chapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

3. 21 U.S.C.A. Section 812(a), which provides:

"(a) There are established five schedules of controlled substances, to be known as Schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter."

4. 21 U.S.C.A. Section 812(c), which provides:

"(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to Section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated..."

5. 44 U.S.C.A. Section 1510(e), which provides:

"(e) The codified documents of the several agencies published in the supplemental edition of the Federal Register under this Section, as amended by documents subsequently filed with the Office and published in the

daily issues of the Federal Register, shall be prima facie evidence of the text of the documents and of the fact that they are in effect on and after the date of publication."

6. 44 U.S.C.A. Section 1507, which provides:

"...The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number."

Statement of the Case

Petitioner Harrison was indicated for unlawful distribution of controlled substances by writing prescriptions. Section 841(a)(1) of Title 21, U.S.C., provides that a physician may be indicted for distributing or dispensing controlled substances. A physician "dispenses" when he prescribes or administers controlled substances. 21 U.S.C. 802(10). The term "distribute" means to deliver, other than by administering or dispensing, a controlled substance. 21 U.S.C. 802(11).

The Fifth Circuit has previously held in *U.S. v. Leigh*, 487 F.2d 206 (5th Cir. 1973), that Congress clearly established two separate offenses; "dispensing" and "distributing" controlled substances are mutually exclusive transgressions of the Comprehensive Drug Abuse Prevention and Control Act of 1970. This Court, in *U.S. v. Moore*, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 222 (1975) has held the provisions of 21 U.S.C. Sections 842 and 843 (which apply specifically to persons registered under 21 U.S.C. Section 822 and assess reduced penalties for those registered) do not purport to exempt physicians and other registrants from the strictures of 21 U.S.C. Section 841. This Court did not rule, however, on the propriety of indicting a physician for "dispensing" or "distributing" controlled substances through the conduit of written prescription.

Petitioner was convicted in April 1980, in the United States Court for the Northern District of Georgia. The Fifth Circuit Court of Appeals reversed Petitioner's conviction in its opinion of October 24, 1980, at *U.S. v. Harrison,* 628 F.2d 929 (5th Cir. 1980). The Court found *U.S. v. Leigh, supra,* to be controlling, and directed the dismissal of the indictment. The Court recited its recent reaffirmation of *Leigh, supra,* in *U.S. v. Thompson,* 624 F.2d 740, 742 (5th Cir. 1980) "(affirming physician's conviction for 'dispensing' controlled substances): 'precedent in this Circuit establishes that, under Title 21 of the Code, a doctor who administers or prescribes a controlled substance in an unlawful manner is to be indicted for dispensing it rather than distributing it. *U.S. v. Leigh.*' "

Upon the grant of the Government's motion for rehearing, the Fifth Circuit withdrew its original reversal of the conviction and issued an affirmance of petitioner's conviction. *U.S. v. Harrison,* 651 F.2d 353 (5th Cir. 1981). The Court found the inclusion in the indictment of "unlawful" distribution "for other than a legitimate medical prupose and not in the usual course of medical practice" to be dispositive and upheld the indictment in the instant case. The Court's opinion vitiated totally the statutory distinction between "dispensing" and "distributing" controlled substances, found at 21 U.S.C. 802 (10) and (11) respectively, and instead invoked the prosecutor's panacea of dubbing an action "unlawful" and "not legitimate medical practice" as justifying affirmance of conviction.

The Court of Appeals also affirmed the trial court's taking of judicial notice of effective dates of inclusion of controlled substances in the federal schedules at 21 U.S.C. 812 and 21 C.F.R. 1308, over counsel for petitioner's objection that a vestige of substantiation must be present before the Court can exercise the fiat of judicial notice. In the instant case, the trial judge took judicial notice of the inclusion of pharmaceuticals in the schedules of controlled substances in the United States Code and the Code of Federal Regulations as of 1980, and not

of the date of alleged offenses (1976 to 1977). At trial, the Government was unable to verify that the subject pharmaceuticals were controlled substances as of the time of alleged infraction; petitioner submits the lack of a foundational modicum precluded the trial court from exercising judicial notice. As it stands, the State failed to establish a material element of each count of the indictment and invoked the strawman of judicial notice to resurrect its case against petitioner.

Trial Court Jurisdiction

The basis of trial court justidiction in the Federal District Court rests upon 21 U.S.C. Section 841. (*See also, U.S. v. McDaniel*), 428 F.Supp. 1226 (D.C. Okl. 1977).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Should Be Reversed for Failing to Delineate Between the Indictable Offenses of "Dispensing" and "Distributing" Controlled Substances.

Supreme Court Rule 17.1(c) envisions the grant of the writ of certiorari where a Federal Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. As previously noted, this Court, in delineating the indictable offenses of registrants under the Controlled Substances Act in *U.S. v. Moore, supra,* did not dispose of the gravamen of this petition for certiorari. The ruling in petitioner's case before the Fifth Circuit effectively eviscerates the distinctions of the legislatively-formulated offenses of "distributing" and "dispensing" under 21 U.S.C. Section 841(a)(1) and 21 U.S.C. Section 802(10) and (11).

The Fifth Circuit's opinion, in overruling its earlier reversal of petitioner's conviction, distinguished the acknowledged controlling authority in the Fifth Circuit of *U.S. v. Leigh, supra.*

In *Leigh*, the defendant physician was charged in multiple counts of "knowingly and intentionally distributing controlled substances, 21 U.S.C. Section 841(a)(1), and for causing the same to be distributed, 18 U.S.C. Section 2(b)." *Leigh, supra,* at 207. Each of the counts described the defendant as a medical doctor and charged that he " 'did knowingly and intentionally *distribute* and cause to be *distributed* (the particular prohibited substance) by means of a prescription signed by defendant.' *In essence, the defendant was charged with the basic offense of unlawfully distributing controlled substances, 21 U.S.C. Section 841(a)(1).*" *Ibid,* (emphasis added). The factual parallels to the instant case are thus without variance. The charged offense was "distribution" under 21 U.S.C. Section 841(a)(1), and, by the *Leigh* court's specific assertion, the distribution was "unlawful."

The *Leigh* court then affirmed the dismissal of the indictment for failure to state an offense, by relying on *U.S. v. Bartee*, 479 F.2d 484, 487 (10th Cir. 1973): "It has been decided that a doctor can be indicted, tried, and convicted for the unlawful *dispensing* of a controlled substance, if his prescription is *not for a legitimate medical purpose in the usual course of his professional practice.* The appellee, however, has not been indicted for unlawful dispensing. The charge is unlawful 'distribution.' " (Emphasis added). Again, the deliberations of the *Leigh* court specifically address the identical facts and issues of the instant case. *Leigh* stands as a paradigm of the instant case, incapable of distinction.

The *Leigh* court then cited Justice Marshall's uncontroverted maxim that the indictment must specify the crime which is to be proved, that the conduct alleged must be an offense against the law, and that one may not be charged with one crime and convicted of another. The *Leigh* court then methodically dissected 21 U.S.C. 841(a)(1), noting four separate and mutually-exclusive offenses were created by Congress, to encompass situations where any person knowingly or intentionally 1) manufactures, 2) distributes, 3) dispenses, or 4) possesses with intent to manufacture, distribute, or dispense, a controlled substance. These separate acts were deemed to constitute unlawful offenses. *Leigh, supra,* p. 208.

Examined next by the *Leigh* court was Section 802(10) of 21 U.S.C., which defines "dispense" as follows:

> "The term 'dispense' means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance, and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject."

The *Leigh* court then noted:

> "*This clearly* means that a doctor who administers or prescribes a controlled substance is, for the purposes of the statute, dispensing it, although as *Bartee, supra,* points out, if he performs that function in an unlawful manner he may be indicted, tried and convicted for it.
>
> This view is buttressed by the provisions of 21 U.S.C. Section 802(11), defining 'distribute': The term 'distribute' means to deliver (other than by administering or dispensing) a controlled substance. The term 'distributor' means a person who so delivers a controlled substance. Obviously, the specific language 'other than by administering or dispensing' is not to be ignored.
>
> The conclusion is inescapable, we believe, that the indictment as drawn fails to charge an offense within the terms of the applicable statutes." Ibid.

Without question, *Leigh* is controlling in the case sub judice and is indistinguishable. The panel of the United States Fifth Circuit Court of Appeals, upon its opinion rendered subsequent to its grant of rehearing, found dispositive the Government's argument in its petition for rehearing that "this case must be distinguished from *Leigh*. There the charge was only knowing and intentional distribution. Here the indictment charged distribution that was 'unlawful' and 'for other than a legitimate medical purpose and not in the usual course of medical practice.' This states an offense." *U.S. v. Harrison*, 651 F.2d 353 (5th Cir. 1981).

As justification for its rationale, the panel proffered a footnote, which reads as follows:

> "In *U.S. v. Thompson,* 625 F.2d 740 (5th Cir. 1980) the physician was charged with 'unlawfully *dispensing* a controlled substance, not in the usual course of professional practice for a legitimate medical purpose.' He asserted, relying on *Leigh*, that the indictment was defective because he could be indicted for *only distributing*

> (and that only an unregistered physician could be indicted for *dispensing* unlawfully). We rejected this argument, and relying on *Leigh*, stated that 'a doctor who administers or prescribes an unlawful substance in an unlawful manner is to be indicted for dispensing it rather than distributing it.' We do not take this statement to mean that a doctor acting unlawfully and for other than a legitimate medical purpose and not in the usual course of medical practice can *only* be indicted for *dispensing*. The indictment in *Leigh* did not charge unlawful administering or prescribing but merely distribution, and we held this was not enough." *Ibid.*

Petitioner submits the panel's reliance on *U.S. v. Thompson, supra,* is simply inappropriate. The status of the instant case renders it a "mirror image" of *Leigh,* and the instant case is indistinguishable. The panel has, by proxy, emasculated the holding and precedent of *Leigh.* Noted the *Leigh* court, "this clearly means that a doctor who administers or prescribes a controlled substance is, for the purposes of the statute, dispensing it, although as *Bartee, supra,* points out, if he performs that function in an unlawful manner he may be indicted, tried, and convicted for it." *Leigh, supra,* p. 208. The court then reiterated the clear congressional intent, that 'to distribute' means to deliver (other than by administering or dispensing)...Obviously, the specific language 'other than by administering or dispensing' is not to be ignored." *Leigh, Ibid.*

The panel's distinguishing, in all due respect, is sophistical. The panel cites the fact the instant case's indictment charged distribution that was "unlawful" and "for other than a legitimate medical purpose and not in the usual course of medical practice." *Harrison, supra,* p. 354. These addendums stand as nothing more then surplusage, failing to address the critical distinction between "distribution" and "dispensing" promulgated by the *Leigh* court. "Distributing" and "dispensing" are mutually exclusive offenses by

virtue of the clear intent of Congress inherent in 21 U.S.C. Sections 802(10) and 802(11). As in *Leigh*, the indictment fails to charge an offense within the terms of the applicable statutes.

As its rationale, the panel cited the addition of the terms "unlawful" and "for other than a legitimate medical purpose and not in the usual course of medical practice" as saving the indictment from adjudged insufficiency. Petitioner submits these addendums are little more than embellishments, which fail to ameliorate the clear distinctions between "distribution" and "dispensing." As noted previously, the *Leigh* court specifically addressed the question of "unlawful" distribution and found such to be less than persuasive. "In essence, the Defendant was charged with the basic offense of unlawfully distributing controlled substances, 21 U.S.C. Section 841(a)(1)." *Leigh, supra,* p. 207. The nomen of "unlawful" did not prevent the *Leigh* court from mandating "distributing," and rightfully so. "Unlawfulness" is nothing short of conclusory, and of no possible assistance to one indicted in the preparation of his defense (other than alerting the individual to the obvious fact he is not being commended by the Government). The addendum of "for other than a legitimate medical purpose and not in the usual course of medical practice" to the indictment in the instant case is likewise inconsequential. The *Leigh* court noted expressly that terminology had been deliberated by the 10th Circuit in *Bartee*; yet the *Leigh* court chose to unequivocally base its decision on the fact that indictment charged "distributing" rather than "dispensing." *Leigh, supra,* p. 207. The panel in the case sub judice, then, has distinguished this case based on two specific criteria addressed by, and found wanting by, the *Leigh* court.

Petitioner respectfully notes that the inclusion of "unlawfully" in the indictment does not render the indictment's statutory infirmities vitiated. Such an inclusion is not

the panacea the panel suggests, and is little more than conclusory surplusage. Additionally, the sound precedent established by this Circuit in *Leigh, supra,* should not be undermined for any reason. The panel obscures the distinctions between "distributing" and "dispensing," in direct contravention to the express intent of Congress. And what is to be garnered by such a "distributing-dispensing" hybrid? Shall this herald the inclusion of "manufacturing" and "possessing" under 21 U.S.C. Section 841(a)(1) with the hybrid, rendering 21 U.S.C. Section 841(a)(1) amorphous? Will the Government be afforded the perquisite of drafting "blanket" indictments in the future as they have in the instant case? Will this not result in "fishing expeditions" for the Government?

Petitioner submits this Court should follow the express design of Congress, rather than opting for prosecutorial expediency.

II.

The Supreme Court Should Exercise Its Discretionary Powers of Review to Examine the Arbitary Exercise of Judicial Notice Which Allows the State the Perquisite of Not Proving Material Elements of Its Case.

Petition was indicted for distribution of four drugs: Didrex (Benzphetamine hydrochloride), Melfiat (Phendimetrazine tartrate), Capital (Acetaminiphen with codeine), and Fastin (Phentermine).

The prescriptions which were introduced into evidence at trial used only brand names of these drugs. The Government sought to establish two facts with respect to these names: that each brand name had a certain equivalent generic name, and that generic names were listed on the federal schedule of controlled substances, 21 U.S.C. Section 812 and 21 C.F.R. 1308.

To this end the Government elicited the testimony of one Special Agent Starling. Agent Starling first described the generic equivalents of the brand names in question. He next

gave his opinion over the objection of petitioner's counsel that all four drugs named in the prescription were Schedule III or Schedule IV controlled substances.

This opinion was based solely on the current edition of the Code of Federal Regulations. Agent Starling did not know when these substances were placed on the schedules.

After the Government offered the schedules of controlled substances listed at 21 C.F.R. Section 1308, the trial court took judicial notice of the fact that the generic names in question were listed in Schedules III and IV.

At that time, petitioner objected that the Government had introduced evidence of the schedules as they were at the time of the trial but not as they were as of the period of the alleged offenses, which was 1976-1977. His motion was overruled.

Petitioner posits the trial court was in error when it took judicial notice of the Code of Federal Regulations schedules without any proof of the schedules as they were in 1976 and 1977.

All courts take judicial notice of the statutes of the United States. 29 Am. Jur.2d *Evidence* Section 27 (1967). "Moreover, the courts will take judicial notice of the effective date of a statute, and whether it existed as law at any particular time." *Id.* Section 28.

The contents of the Federal Register are required to be judicially noticed, 44 U.S.C. Section 1507 (1967), and the contents of the Code of Federal Regulations are prima facie evidence of agency documents, text and effective dates, 44 U.S.C. Section 1510(e) (1969).

A trial judge has wide latitude in taking judicial notice of statutes and regulations. He "may examine decisions and books containing statutes printed by the official printer of the jurisdiction." Annot. 35 A.L.R.Fed. 440 (1977); *see United States v. Atwell,* 71 F.R.D. 357 (D.Del. 1976).

However, where there is any doubt as to the verifiable certainty of the text of a statute or a regulation, the trial court

should not take judicial notice, but instead should require additional evidence. 29 Am.Jur.2d, *supra* Sections 24-25.

Before applying the facts of appellant's case to these principles of judicial notice some aspects of the statutes and regulations under which appellant was indicted must be considered.

21 U.S.C. Section 812 (amended 1978) established the schedules of controlled substances within the Comprehensive Drug Abuse Prevention and Control Act of 1970, Publ. L. 91-513, Title II, Section 101, 84 Stat. 1242. The schedules became effective October 27, 1970, *Id.* Section 704. 28 Section 812(c) provides that the schedules "shall, unless and until amended. . . consist of the (drugs listed therein)." Further, the schedules must be updated and republished annually. 21 U.S.C. Section 812(a) (1970).

It is true that the drugs in question are listed in the 1980 edition of the Code of Federal Regulations. 21 C.F.R. Section 1308.13(b)(2) (benzphetamine), Section 1308.13(b)(6) (phendimetrazine), Section 1308.13(e)(2) (codeine not more than 1.8 grams, in preparation with nonnarcotic), Section 1308.14(e)(2) (phentermine). However, this is the sole source the trial judge relied on in taking judicial notice.

There is no indication that the court considered the list in the 1970 statute. Even if it had, only one of the four drugs is listed there: codeine, 1.8 grams or less mixed with a nonnarcotic substance. 21 U.S.C. 812(c), Schedule III(d)(2). Therefore, the other three were added sometime in the subsequent period before 1980.

The court never confronted this problem. When it took judicial notice of the schedules it simply assumed that the 1976-1977 versions were identical to 1980's, in the face of appellant's vigorous objection. This assumption was totally unjustified. The court should have ordered the Government to produce additional evidence on the point, but it did not. 29 Am.Jur.2d, *supra.*

The Government's proof should have shown that appellant's acts took place after the effective date of the offenses. 1 *Underhill's Criminal Evidence* Section 88 (6th Ed. 1973).

The Government failed to offer any proof at all on this point, and thus failed to establish a material element of each count of the indictment. Therefore, the verdict should be reversed.

Conclusion

For the reasons stated above, petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals, Unit B (now the Eleventh Circuit Court of Appeals).

Respectfully submitted,

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November 5, 1981

APPENDIX A

Order.

United States Court of Appeals, for the Fifth Circuit, Unit B.

United States of America, Appellee, vs. Jim T. Harrison, Appellant. No. 80-7416.

Filed September 11, 1981.

Before GODBOLD, Chief Judge, and KRAVITCH and HATCHETT, Circuit Judges.

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

APPENDIX B

United States of America, Plaintiff/Appellee, vs. Jim T. Harrison, Jr., Defendant/Appellant. No. 80-7416.

United States Court of Appeals for the Fifth Circuit, Unit B.

Decided October 24, 1980.

Before GODBOLD, KRAVITCH and HATCHETT, Circuit Judges.

GODBOLD, Circuit Judge:

Appellant is a doctor of osteopathics, authorized under Georgia law to perform the same services as a medical doctor. He was indicted on 37 counts of distributing controlled substances in violation of 21 U.S.C. Section 841(a)(1) and 21 C.F.R. Section 1306.[1] He appeals from his conviction by a jury of 33 of the 37 counts. We agree with appellant that this case is controlled by *U.S. v. Leigh*, 487 F.2d 206 (5th Cir. 1973), and we accordingly reverse the directions to dismiss the indictment.

Section 841(a)(1) of 21 U.S.C. makes it unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." In *Leigh*, this Court held that, under the definitions of the terms "dispense" and "distribute" in 21 U.S.C. Section 803(10) and (11), "a doctor who administers or prescribes a controlled substance is, for the purpose of the statute, *dispensing* it, "*Leigh*, 487 F.2d at 208 (emphasis added), and affirmed the dismissal of an indictment charging a doctor with "distributing rather than "dispensing" a controlled substance.

---

[1]Count I is representative of the other counts of the indictment:

On or about the 22nd day of March, 1977, within the Northern District of Georgia, the defendant JIM T. HARRISON, JR., did unlawfully and knowingly *distribute* and *cause to be distributed* a Schedule III controlled substance, that is Didrex (Benzphetamine hydrochloride) pursuant to a prescription numbered 156753, for other than a legitimate medical purpose and not in the usual course of professional practice, in violation of Title 21, United States Code, Section 841(a)(1) and Title 21, C.F.R. Section 1306. (Emphasis added).

The government argues that "decisions subsequent to *Leigh* have rendered *Leigh* of dubious precedential value," citing *U.S. v. Moore*, 423 U.S. 122, 96 S. Ct. 335, 46 L.Ed.2d 333 (1975); *U.S. v. Dunbar*, 614 F.2d 39 (5th Cir. 1980); and *U.S. v. Greenfield*, 574 F.2d 305 (5th Cir.), *cert. denied*, 439 U.S. 860, 99 S.Ct. 178, 58 L.Ed.2d 168 (1978). We must disagree. In *Moore*, the Supreme Court held that the provisions of 21 U.S.C. Sections 842 and 843, which apply specifically to persons registered under 21 U.S.C. Section 822, and which provide lesser penalties than does Section 841, do not imply an exemption from Section 841 for physicians and other registrants. Although the government relies on the Supreme Court's statement of the issue as "whether persons who are registered under the Controlled Substances Act . . . can be prosecuted under Section 841 for dispensing or distributing controlled substances," *Moore*, 423 U.S. at 124, 96 S. Ct. at 337, 46 L.Ed.2d at 337, that case did not address the question whether a physician is properly charged with "dispensing" or "distributing." Similarly, although both *Dundar* and *Greenfield* upheld convictions of physicians for "distributing" controlled substances, neither case considered the issue presented here. Moreover, this Court only recently reaffirmed the holding of *Leigh* in dictum in *U.S. v. Thompson*, 624 F.2d 740, 742 (5th Cir. 1980) (affirming physician's conviction for "dispensing" controlled substances): "Precedent in this circuit establishes that, under Title 21 of the Code, a doctor who administers or prescribes a controlled substance in an

unlawful manner is to be indicted for dispensing it rather than distributing it. *U.S. v. Leigh.*"

Appellant also challenges the procedure by which the trial judge took judicial notice of the schedules of controlled substances listed in 21 C.F.R. Section 1306 and the sufficiency of the evidence to support his conviction on counts 15 through 27. Because of our disposition of appellant's challenge to the indictment, we need not consider these objections.

APPENDIX C

United States of America, Plaintiff/Appellee, vs. Jim T. Harrison, Jr., Defendant/Appellant. No.80-7416.

United States Court of Appeals for the Fifth Circuit.

Decided July 20, 1981.

Before GODBOLD, Chief Judge, and KRAVITCH and HATCHETT, Circuit Judges.

On Petition for Rehearing and Petition for Rehearing En Banc.

GODBOLD, Chief Judge:

Appellant, an osteopathic doctor, was charged with "unlawfully and knowingly distributing and causing to be distributed a controlled substance...for other than a legitimate medical purpose and not in the usual course of professional practice," in violation of 21 U.S.C. 841(a)(1). This section makes it unlawful "to manufacture, distribute, or dispense...a controlled substance." We held, *U.S. v. Harrison* 628 F.2d 929 (5th Cir. 1980) that the indictment must be dismissed, relying on *U.S. v. Leigh*, 487 F.2d 206 (5th Cir. 1973) in which we dismissed an indictment that charged the defendant, a medical doctor "did knowingly and intentionally distribute...a controlled substance in violation of Section 841(a)(1)."

(1) We agree with the government's argument in its petition for rehearing that this case be distinguished from *Leigh*. There the charge was only knowing and intentional distribution. Here the indictment charged distribution that was "unlawful" and "for other than a legitimate medical purpose and not in the usual course of medical practice." This states an offense.[1]

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[1] In *U.S. v. Thompson*, 624 F.2d 740 (5th Cir. 1980) the physician was charged with "unlawfully dispensing a controlled substance, not in the usual course of professional practice for a legitimate medical purpose." He

The allegations present in this case protect the doctor from exposure to criminal prosecution for errors of judgment as to the amount of prescribed and as to the necessity for the prescription.

(2) We consider two other points that were pretermitted in our original opinion. The court took judicial notice that the generic names of the four drugs that appellant was indicted for distributing were listed in the federal schedule of controlled substances, 21 U.S.C. Section 812, 21 C.F.R. 1308. Appellant insists that the court was required to take testimony to show that the C.F.R. schedules showed as of the dates of the offenses charged, 1976 and 1977. The argument misconceives the nature of judicial notice, which dispenses with the necessity of proof. The Federal Register specifies the effective date of each regulation, and this is required to be judicially noticed along with the content of the regulation. Both the 1976 and 1977 editions of the C.F.R. list as controlled substances the drugs appellant was convicted of distributing. This is all that is required.

(3) There was sufficient evidence to permit submission to the jury of counts 15 through 27. Appellant urges that it was not shown that the prescriptions charged in these counts were written for other than legitimate medical purposes. The contention is based upon two incorrect hypotheses. *U.S. v. Rosen*, 582 F.2d 1032 (5th Cir. 1978) is not an exclusive and exhaustive list of the types of conduct by which a physician can breach the limits of legitimate medical practice nor does it

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asserted, relying on *Leigh*, that the indictment was defective because he could be indicted for only distributing (and that only an unregistered physician could be indicted for dispensing unlawfully). We rejected this argument, and, relying on *Leigh*, stated that "a doctor who administers or prescribes an unlawful substance is an unlawful manner is to indicted for dispensing it rather than distributing it." We do not take this statement to mean that a doctor acting unlawfully and for other than a legitimate medical purpose and not in the usual course of medical practice can only be indicted for dispensing. The indictment in *Leigh* did not charge unlawful administering or prescribing but merely distribution, and we held this was not enough.

establish some minimum number of types of conduct that must be present to permit submission to the jury of the legitimate medical practice issue. The fallacy of appellant's mechanistic approach is demonstrated by the presence in this case of testimony that appellant would make up fictitious names for prescriptions, or ask the "patient" to supply him with names to be used, and even alluded to the difficulties he might encounter by having no files on the confected names. Nor was the jury, in considering the issue of exceeding the legitimate bounds of medical practice, limited to considering only prescriptions charged in counts 11 through 27. Prescriptions issued at other times were admissible as evidence of plan, design or scheme.

The petition for rehearing of GRANTED and the conviction of appellant is AFFIRMED. No member of this panel or judge in regular active service on the court has requested that the court be polled on rehearing en banc, FRAP Rule 35, Fifth Circuit Local Rule 16, therefore, the petition for rehearing en banc is DENIED.